Filed 1/26/10 P. v. Cannon CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WARDINE KIMM CANNON, Defendant and Appellant.	E046065 (Super.Ct.No. SWF014049) **OPINION**

APPEAL from the Superior Court of Riverside County. Sherrill A. Ellsworth, Judge. Affirmed.

J. Peter Axelrod, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Steve Oetting and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Wardine Kimm Cannon is a registered sex offender. In 2005, he moved twice, but he failed to reregister either time. Accordingly, he was found guilty on two counts of failing to register as a sex offender. (Former Pen. Code, § 290, subd. (a); see

now Pen. Code, § 290, subds. (b) & (c), effective Jan. 1, 2007.) Three "strike" prior allegations were found true. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12.) Defendant was sentenced to two concurrent terms of 25 years to life in prison.

In this appeal, defendant contends:

1. The trial court failed to conduct a sufficient inquiry to identify a prospective juror who had allegedly remarked that defendant was guilty.

2. The trial court erred by ruling that defendant's admission to his attorney that he was "wrong for not registering" was not attorney-client privileged merely because a sheriff's deputy overheard it.

3. During the hearing regarding the admissibility of defendant's admission to his attorney, defendant's trial counsel rendered ineffective assistance by failing to object to a deputy district attorney's hearsay statement that he, too, overheard defendant's admission.

4. The sentence of 25 years to life for failing to register constitutes cruel and unusual punishment.

We find no error. Hence, we will affirm.

I

FACTUAL BACKGROUND

It was stipulated that defendant had been convicted of an offense such that he was required to register as a sex offender.

On September 1, 2004, defendant began living in El Monte. On September 2, 2004, he duly registered with the El Monte Police Department, using his El Monte address. At that time, he was warned, orally and in writing, that he had a duty to

reregister if he moved or changed his address. He had been given similar warnings before, in 1990 and 1992.

On October 8, 2004, defendant moved away from El Monte. However, he did not reregister.

On four occasions in 2005, defendant pawned jewelry at a pawn shop in Hemet. In April, May, and August 2005, he listed his address on the pawn slips as 262 North Elk Street in Hemet. In September 2005, he listed his address on the pawn slip as 41722 Marine Drive in Hemet.

In October 2005, these pawn slips came to the attention of the Riverside County Sheriff's Department. As a result, on October 27, 2005, Deputy Greg Miller went to the Marine Drive address. He found defendant and a woman there. (However, he did not find any of defendant's clothing or any other evidence that defendant was living there.)

When the police interviewed defendant, he admitted that he had moved to the Elk Street address in approximately October 2004 and to the Marine Drive address in July 2005. He also admitted that he knew he had a duty to register, but he said he had decided not to.

In December 2005, just before the preliminary hearing, the sheriff's deputy assigned to the courtroom heard defendant say to his attorney, in a loud voice, "I admit I was wrong for not registering."

II

THE TRIAL COURT'S FAILURE TO TRY TO IDENTIFY

THE PROSPECTIVE JUROR WHO SAID, "THE DEFENDANT IS GUILTY"

Defendant contends that, during voir dire, the trial court erred by failing to try to identify a prospective juror who had allegedly remarked that defendant was guilty.

A. *Additional Factual and Procedural Background.*

During voir dire, both sides stipulated to excuse prospective juror Ms. A., who was an attorney. Before she was actually excused, however, defense counsel informed the trial court that Ms. A. had overheard another prospective juror making a remark to the effect that, "The defendant is guilty. I don't know why we're even doing this."

The trial court questioned Ms. A. She reported: "I was out in the hallway. I'm not exactly sure who it came from. I know the general group of people. I know one of the people in the group. I can point that person out. I'm not sure if that was the person that said it. They were talking about the delays, how long it was taking between coming back in, how they kept being told it was ten minutes, and it's longer and longer and longer. They said, 'Well, he's guilty anyway. Why are we wasting all this time,' something to that effect."

This colloquy ensued:

"THE COURT: . . . [¶] That comment with regard to delays . . . I believe I will be able to handle by talking to the group; so I'll handle it that way. If it becomes a problem —

"[DEFENSE COUNSEL]: I think I have to, for the record, ask the Court . . . to have her point out who the person was . . . , to maybe have that person come in, so the Court can take that person individually to make sure that person knows what the law is and ask if she can point out any other jurors. And, then, for the record, I have to ask if the Court's not inclined, to ask for a mistrial.

"THE COURT: I'm denying both of those motions at this time. . . . Ms. A[.] is not able to tell us who was the speaker of the comment . . . . But I'll handle it first thing when they come in this morning."

The trial court then called in the prospective jurors and admonished them:

"I would like to talk to all the jurors with regards to a couple of things. The first thing is the delays.

"Yesterday, for example, there were times when we told you it would be ten more minutes or fifteen more minutes. Sometimes that turned into forty or thirty, or even an hour . . . . [¶] . . . [¶]

" . . . So sometimes there are significant delays. Sometimes there are minor delays. Regardless, it is not the job of the jury to make a determination, to speculate, or try to guess as to why there is a delay. I can only apologize to you. . . .

" . . . So if there is a delay, it is very important that you understand that speculating as to the delay or somehow considering the delay having some impact on the important law — I talked about that burden of proof, the presumption of innocence — speculating as to something with regard to that is against the law and orders of this Court.

"So, for example, if there is a delay, and there's conversations that take place between jurors that has anything to do about this case, you are not following the Court orders. In fact, you are putting yourself in the position where you jeopardize the opportunity for a fair trial. . . .

"Now, . . . it has come to the attention of the Court somebody believes there was a dialogue that went on that talked about delays and talked about issues pertaining to how rulings should be made in terms of one's deliberation.

"I need to have an assurance from you by raising your hand that you are keeping an open mind, that you have not yet made up your mind about this case, that you are going to give a fair trial[.] . . . [T]hose of you who are open[-]minded and that have listened to and are willing to keep an open mind throughout this trial, if you'll raise your hand at this time.

"The record will reflect that everybody has raised their hand.

"Please do not have any discussion about this case, even a casual remark is inappropriate if it has anything to do with this case. . . ."

The trial court then resumed voir dire. The next time it was defense counsel's turn to question the prospective jurors, she stated: "You can understand the dilemma . . . if you would have a relative or if you were sitting over in that position where Mr. Cannon is, and you heard jurors were saying, 'I don't know why we're doing this. I don't know why we're picking a jury or why we're going to trial. He's probably guilty,' that would make you feel really bad if you were the person over there, knowing that in this jury

system we can't find people, twelve people, who will listen to the evidence and will be fair and impartial regardless of the charge.

"So, for the first twenty-four people that we have asked questions[,] . . . it's important to be truthful. There are no right or wrong answers. We really need you to be honest. If there are any in the twenty-four who feel they cannot do that, they just cannot be fair and impartial based on the charge, would you raise a hand? [¶] Okay."

In the course of voir dire, four prospective jurors admitted that they could not be fair and impartial; they were removed for cause. One prospective juror was removed for cause on another ground. Twenty-three prospective jurors were removed by peremptory challenges. One prospective juror who failed to return to court was excused. One sworn juror was replaced during trial by an alternate. The second alternate was never seated.

B. *Analysis.*

We begin by emphasizing that the issue before us is *not* what should happen when one juror reports possible bias by another juror during the trial. (See, e.g., *People v. Barnwell* (2007) 41 Cal.4th 1038, 1051-1054.) Rather, it is what should happen when one *prospective* juror reports possible bias by another *prospective* juror during *jury selection*.

We have not found any case directly on point. Nevertheless, we find guidance in the general principles governing voir dire. "The purpose of voir dire of the jury is to permit a development of any potential basis for a challenge for cause. [Citation.]" (*People v. Butler* (1980) 104 Cal.App.3d 868, 874.) " . . . '"[T]he trial court has 'considerable discretion . . . to contain voir dire within reasonable limits' [citations]. . . .

Limitations on voir dire are subject to review for abuse of discretion. [Citation.]" [Citation.]'" (*People v. Butler* (2009) 46 Cal.4th 847, 859.)

In *People v. Holt* (1997) 15 Cal.4th 619, the defendant argued that the trial court had not questioned prospective jurors adequately about possible racial bias. (*Id*. at p. 660.) The Supreme Court rejected this argument, explaining: "[T]he inquiry was not conducted by the judge alone. Both sides were afforded unlimited opportunity to inquire further into the views of the prospective jurors and to probe for possible hidden bias and took advantage of that opportunity. . . . Unless the voir dire by a court is so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not a basis for reversal. [Citation.] A fortiori, the same standard of reversible error applies when both the court and counsel participate in the voir dire." (*Id*. at p. 661.)

Here, the trial court simply refused to make one particular inquiry — it refused to ask Ms. A. to identify the one prospective juror whom she remembered as being in the group that heard (or may have heard) the comments by the suspect juror. Much as in *Holt*, however, it did not limit defense counsel's ability to voir dire on this topic. Thus, defense counsel remained free to ask each and every single prospective juror such questions as: (1) Have you heard any other prospective juror say anything about the delays in this trial? (2) Have you heard any other prospective juror say that his or her time was being wasted? (3) Have you heard any other prospective juror say that defendant was, or probably was, guilty? (4) Have *you* said any such thing to any other prospective juror?

The only even arguable distinction between this case and *Holt* is that here, defense counsel did not actually ask all of the follow-up questions that she could have asked. However, she did point out that defendant would "feel really bad" if a juror said that he was probably guilty, and she did ask if anyone felt he or she could not be fair and impartial. Likewise, the trial court referred to "a dialogue . . . about delays," then asked the prospective jurors whether they had an open mind. It also asked every single juror whether there was any reason why he or she could not be fair and impartial to both sides.

By failing to make a more specific inquiry herself, defense counsel forfeited any claim that the trial court had not made an adequate inquiry. "[T]o now grant relief would allow appellant to gamble on a favorable result at trial, knowing that if he did not prevail there, he would prevail on appeal. [Citations.]" (*People v. Bohana* (2000) 84 Cal.App.4th 360, 367.)

We have no intention of minimizing the injustice that could be done if even one single trial juror had prejudged defendant's guilt. However, the tried and true method of preventing such an injustice is to allow counsel for both sides to conduct a searching voir dire. Defense counsel was free to do so here.

Separately and alternatively, even assuming the trial court erred, defense counsel's inaction makes it impossible for defendant to show prejudice. In this respect, *People v. Pinholster* (1992) 1 Cal.4th 865 is on point. There, the defendant argued that certain jurors had committed misconduct by reading a newspaper article about the prosecutor. (*Id*. at p. 926.) The trial court questioned the jurors as a group; it allowed defense counsel

question them as a group, too, but defense counsel did not do so. The trial court instructed the jurors to disregard the article. (*Id*. at pp. 926-927.)

On appeal, the defendant argued that the trial court should have questioned the jurors individually. (*People v. Pinholster*, *supra*, 1 Cal.4th at pp. 927-928.) The Supreme Court disagreed, stating: "[C]ounsel declined the opportunity to question the jury as a group on the article. [Citation.] Under the circumstances, even if we were of the view that the trial court should have inquired more fully into the question of misconduct, no prejudice appears." (*Id*. at p. 928.) Here, as in *Pinholster*, because defense counsel could have questioned the prospective jurors further but did not, no prejudice appears.

Finally — and again, separately and alternatively —defendant also cannot show prejudice because there is no substantial likelihood that the assertedly biased prospective juror actually sat on the jury. Out of an excess of caution, we use the same standard of prejudice that would apply to actual misconduct by a sitting juror: "'If we conclude there was misconduct, we then consider whether the misconduct was prejudicial.' [Citation.] The verdict will only be set aside if there appears to be a substantial likelihood of juror bias. [Citation.]" (*People v. Loker* (2008) 44 Cal.4th 691, 747.)

Here, however, four prospective jurors admitted that they could not be fair and impartial; all four were removed for cause. If the prospective juror who remarked that defendant was guilty was actually biased (i.e., not just joking or just blowing off steam about the delays), then presumably he or she was one of these four. Even if not, we know that there were at least 27 other prospective jurors who never made it onto the sworn jury — probably more, as an unknown number of prospective jurors remained in the venire

when both sides accepted the panel. Thus, the likelihood that the assertedly biased prospective juror actually served on the jury was minimal.[1]

We therefore conclude that the trial court's failure to conduct a further inquiry did not constitute prejudicial error.

III

DEFENDANT'S ADMISSION TO HIS THEN-ATTORNEY

Defendant contends that his statement to his then-attorney that he was "wrong for not registering" was protected by the attorney-client privilege. He also argues that, during the hearing on the admissibility of this statement, his trial counsel rendered ineffective assistance by failing to object to a prosecutor's hearsay statement that he, too, heard the statement.

A. *Additional Factual and Procedural Background.*

1. *The first section 402 hearing.*

Prior to trial, defense counsel objected to the admission of defendant's statement to his attorney at the preliminary hearing, based on the attorney-client privilege. The trial court, on its own motion, held a hearing pursuant to Evidence Code section 402 (section 402).

---

[1] Defendant concedes that he "must speculate" as to whether the suspect juror "actually sat on the jury" or "was actually biased."

At the hearing, Deputy Jack Rutigliano testified that on December 2, 2005, he was providing security for the courtroom in which defendant's preliminary hearing was being held. Defendant was sitting with his then-attorney at the counsel table.

Defendant was "whispering on and off . . . ." Deputy Rutigliano then heard defendant say, "I admit I was wrong for not registering." He said it "pretty loud." At that point, Deputy Rutigliano was about three feet behind defendant.

Based on this testimony, the trial court excluded defendant's statement as privileged.

2. *The second section 402 hearing.*

After a recess, the prosecutor asked the trial court to reconsider the issue in light of *People v. Urbano* (2005) 128 Cal.App.4th 396. The trial court, again on its own motion, held a further section 402 hearing.

This time, Deputy Rutigliano added that he was 20 to 30 feet away from defendant, at the opposite end of the courtroom, when he first heard defendant talking loudly. On a scale of one to ten, defendant's voice was "[m]aybe a seven." Defendant's own attorney asked defendant twice to keep his voice down.

Deputy Rutigliano got up, walked across the courtroom, and told defendant to keep his voice down. He had taken a step or two back, and thus he was about three feet behind defendant, when he heard defendant say, "I admit I was wrong for not registering."

According to Deputy Rutigliano, Deputy District Attorney Michael Dauber was also present for the preliminary hearing. He was sitting 10 to 15 feet away from defendant, on the opposite side of the courtroom. Dauber walked over to Deputy

Rutigliano and asked, "Did you hear what he said?" Deputy Rutigliano said, "Yes." Dauber asked, "What did you hear him say?" Deputy Rutigliano told him. Dauber then said, "That's what I heard. I need you to write a report."

After hearing this testimony, the trial court ruled that defendant's statement was admissible. It explained: "[T]he defendant elevated his voice, and the deputy told him to keep his voice down. That testimony, coupled with his attorney telling him to keep his voice down, changes the conversation from where the Court indicated that . . . keeping his voice down cloaked him in th[e] privilege. He was warned by the deputy. He was warned by his defense counsel.

"It was heard, even though the deputy was close[ ]by, the prosecutor at the time heard also; and therefore it appears to me that it is admissible and that the privilege has been waived . . . ."

At trial, therefore, Deputy Rutigliano testified that that, while in court, he heard defendant say to his attorney, loudly, "I was wrong for not registering."

B. *Analysis*.

1. *Attorney-client privilege*.

Defendant's admission to his attorney could be privileged if and only if it was confidential. (Evid. Code, § 954.) This would require that it be made in a way such that it was not disclosed to third persons. (Evid. Code, § 952.)

"The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship. [Citations.] Once that party establishes facts necessary to

support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply. [Citations.]" (*Costco Wholesale Corp. v. Superior Court* (Nov. 30, 2009, S163335) ___ Cal.4th ___ [2009 Cal. LEXIS 12375] *8-*9].)

"'"'When the facts, or reasonable inferences from the facts, shown in support of or in opposition to the claim of privilege are in conflict, the determination of whether the evidence supports one conclusion or the other is for the trial court, and a reviewing court may not disturb such finding if there is any substantial evidence to support it [citations].'" [Citation.] Accordingly, unless a claimed privilege appears as a matter of law from the undisputed facts, an appellate court may not overturn the trial court's decision to reject that claim. [Citation.]" (*HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54, 60.)

As the People argued below, *People v. Urbano*, *supra*, 128 Cal.App.4th 396 is virtually on point. There the defendant and his attorney were seated "in the jury box of his preliminary hearing courtroom when court was not in session." (*Id*. at p. 402.) A witness, Green, was sitting in the last row of seats. Green saw the defendant become agitated; the defendant then pointed to another witness who was also waiting to testify, and Green heard him say, "'[T]hat guy was drunk.'" (*Ibid*.) The trial court ruled that this statement was not privileged because the defendant "had no need to speak in a voice 'loud enough for individuals in the audience to hear,' as his attorney was sitting right next

to him in the jury box, but nevertheless made his communication in a way that 'clearly disclose[d] it to third persons.'" (*Id*. at p. 403.)

On appeal, the defendant argued that "the attorney-client privilege is applicable since his intent to communicate confidentially with his attorney controls." (*People v. Urbano*, *supra*, 128 Cal.App.4th at p. 402.) The appellate court, however, agreed with the trial court: "Since [the defendant], sitting next to his attorney in the jury box when court was not in session and lawyers were engaged in conversation throughout the courtroom, spoke to his attorney loudly enough that Green, openly present in the last row of seats in the courtroom, overheard his comment and saw his gesture, we . . . hold the attorney-client privilege inapplicable." (*Id*. at p. 403, fn. omitted.)

Defendant tries to distinguish this case from *Urbano* on the ground that he was at counsel table, not in the jury box, and therefore he had "a higher expectation of privacy for attorney-client communications." The trial court, however, could properly find that he had no such expectation, particularly in light of the fact that he had been warned repeatedly, by his counsel as well as by Deputy Rutigliano, to keep his voice down. Moreover, defendant made the admission even though Deputy Rutigliano was still only three feet away.

Defendant also argues that the privilege should apply because he "was not provided an opportunity to meaningfully communicate with his attorney anywhere other than at counsel table in a public and noisy courtroom." He claims that "[t]he facilities did not permit private, earnest, free and frank discussion between appellant and counsel without being overheard." The record, however — particularly when viewed in

accordance with the applicable standard of review — indicates that defendant was able to communicate with his attorney in confidence, by whispering. He did not raise his voice because he had to, but rather because he was angry.

Defendant claims that earlier, the trial court itself had been able to overhear a conversation at counsel table. Once again, however, the record does not support this. When the trial court made its initial ruling, excluding defendant's admission, it observed: "Even this morning when I requested whether or not your client was going to waive his right to have a jury trial with regard to the priors, you turned and had a conversation with your client. And, even if some words were audible, it would be improper for this deputy or this bench officer or anybody else to use that against him . . . ." All this establishes is that the trial court *saw* defense counsel talk to defendant. The court then stated that "*even if*" the conversation had been audible, it could not be used against him. This suggests that, in fact, it was not audible.

In any event, the fact (if it was a fact) that the trial court could hear a conversation at the counsel table is not controlling. When defendant made the admission at issue, court was not in session, so no judge was on the bench. Thus, on this record, he could have communicated privately if he had tried.

We therefore conclude that the trial court did not err by finding that defendant's statement was unprivileged and admissible.

2. *The deputy district attorney's hearsay statement*.

In a related contention, defendant contends that his counsel rendered ineffective assistance by failing to object to the testimony at the section 402 hearing that Deputy District Attorney Dauber said that he, too, heard defendant's admission.[2]

"'"'"[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citations.] Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."'" [Citations.]' [Citation.]" (*In re Hardy* (2007) 41 Cal.4th 977, 1018-1019.)

The People argue that Dauber's statement was admissible under the spontaneous statement exception. (Evid. Code, § 1240.) This exception requires, among other things, that the declarant be "under the stress of excitement . . . ." (Evid. Code, § 1240, subd. (b).) "[T]he basis for the circumstantial trustworthiness of spontaneous utterances is that in the stress of nervous excitement, the reflective faculties may be stilled and the

---

[2] At trial, Deputy Rutigliano testified that he "bec[a]me aware" that the deputy district attorney who was prosecuting defendant had also heard the statement. Defendant, however, argues only that his counsel should have objected during the section 402 hearing; he does not argue that his counsel should have objected to this testimony at trial.

utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief." (*People v. Farmer* (1989) 47 Cal.3d 888, 903, disapproved on other grounds by *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) There is no reason to surmise that Dauber was excited to this extent.

The People also argue that Dauber's statement was introduced for a nonhearsay purpose — (1) to show that defendant should have known that he would be overheard, and/or (2) to "explain[] the deputy's subsequent conduct." The statement, however, was not relevant for the first purpose unless it was true; hence, even if offered for this purpose, it was still hearsay. As to the second purpose, the reason for Deputy Rutigliano's subsequent conduct (presumably meaning his reason for writing a report) was not relevant.

Thus, a hearsay objection would have been meritorious. We need not decide, however, whether defense counsel's failure to object on hearsay grounds fell below an objective standard of reasonableness, or whether, on the other hand, it could be explained as a matter of sound trial strategy, because it does not appear that it was prejudicial.

As we discussed in part III.B, *ante*, the main legal support for the trial court's ruling was *Urbano*. Thus, the main evidentiary support for it was much the same as in *Urbano* — defendant was sitting right next to his attorney, yet he spoke loudly enough for at least one other person in the courtroom to hear him. It was also significant that, in this case, defendant had been cautioned three times to keep his voice down. Thus, in explaining its reasoning, the trial court stated that what had changed its mind was that both Deputy Rutigliano and defendant's attorney had told him to keep his voice down.

Admittedly, the hearsay fact that Dauber also heard defendant was *relevant*. Thus, the trial court quite properly also referred to this fact. However, it did not say that this fact had caused it to change its mind. Moreover, this fact served mainly to corroborate Deputy Rutigliano's testimony that he himself heard defendant's admission.

We therefore see no reasonable likelihood that even if defense counsel had objected to Dauber's hearsay statement, the trial court would have excluded defendant's admission.

IV

CRUEL AND UNUSUAL PUNISHMENT

Defendant contends that the sentence of 25 years to life constitutes cruel and unusual punishment.

A. *Additional Factual and Procedural Background.*

At the time of sentencing, defendant was 41 years old. He had juvenile adjudications for petty theft (Pen. Code, §§ 484, 488), robbery (Pen. Code, § 211), attempted robbery (Pen. Code, §§ 211, 664), and burglary (Pen. Code, § 459). He admitted that he was a gang member from the age of 12 into his early 20's; he claimed that these crimes "were all gang-related."

In addition, he had the following adult criminal record:

1. In 1985, when defendant was 18, he was convicted of rape (Pen. Code, § 261) and robbery (former Pen. Code, § 213.5) and sentenced to six years in prison. In 1988, he was released on parole. Two months later, however, he violated parole, and in 1989, he was arrested and returned to prison. In 1990, he was released on parole again, but four

months later, he violated parole, and in 1991, he was arrested and returned to prison. In 1992, he was released on parole yet again, but two years later, he violated parole (apparently by committing bank robbery), and in 1996, he was arrested and returned to prison. He was finally released from state prison in May 1997.

2. Meanwhile, in March 1997, defendant was convicted in federal court of bank robbery (18 U.S.C. § 2113(a)) and conspiracy (18 U.S.C. § 371), with a firearm use enhancement (18 U.S.C. § 924(c)). He was sentenced to nine years three months in federal prison. He was released in 2004.

3. In October 2004, defendant absconded from a halfway house following his release from federal prison. Thus, he was a parolee at large until his arrest in this case on October 27, 2005. At the time of trial, he was facing a federal charge of escape. (18 U.S.C. § 751.)

B. *Forfeiture*.

Preliminarily, the People argue that defense counsel forfeited defendant's cruel and unusual punishment claim by failing to raise it below. We agree. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.)

Defendant claims that his counsel did in fact raise this issue, albeit in the context of a motion to strike his strike priors. Not so. In that motion, his counsel stated: "[T]he California Supreme Court suggests that the trial court balance the defendant's constitutional rights, which include the guarantees against disproportionate punishment of the Eighth Amendment to the United States Constitution and Article I, section 17 of the California Constitution, with society's legitimate interests, which embrace the fair

prosecution of properly charged crimes." She did not explain, however, how this abstract principle applied in defendant's case. She also asserted that a three-strikes sentence would cause "severe, unreasonable, and disproportionate detriment to [defendant] and his family." This was merely an argument that the punishment was unfair, not that it was so disproportionate as to be unconstitutional. These fleeting references to disproportionality would not have alerted the trial court that it was being asked to decide whether a three-strikes sentence was cruel and unusual punishment.

Defendant, however, also contends that the failure to raise this issue constituted ineffective assistance. If the sentence did constitute cruel and unusual punishment, there could be no rational tactical purpose for failing to raise the issue; moreover, the failure to raise it would necessarily be prejudicial. We conclude that we should reach the underlying issue, even if only under the rubric of ineffective assistance of counsel. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229-230; *People v. DeJesus*, *supra*, 38 Cal.App.4th at p. 27.)

B. *Analysis Under the Federal Constitution*.

The United States Supreme Court has upheld three-strikes sentencing, even when applied, as here, to a person convicted of a nonviolent third strike. In *Ewing v. California* (2003) 538 U.S. 11 [123 S.Ct. 1179, 155 L.Ed.2d 108], the defendant had four strike prior convictions (*id*. at p. 19), plus a number of nonstrike priors. (*Id*. at pp. 18-19.) While still on parole, he stole three golf clubs, worth a total of $1,200. (*Id*. at pp. 17-18.) As a result, he was sentenced under California's three strikes law to 25 years to life. (*Id*. at p. 20.)

A plurality of three justices held that this did not constitute cruel and unusual punishment. They explained: "When the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth Amendment prohibits California from making that choice." (*Ewing v. California*, *supra*, 538 U.S. at p. 25 (plur. opn. of O'Connor, J.).) They noted: "In weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism." (*Id*. at p. 29.) The plurality concluded: "Ewing's sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record." (*Id*. at pp. 29-30, fn. omitted.)

Justices Scalia and Thomas, concurring in the judgment, would have held that the Eighth Amendment does not require proportionality at all. (*Ewing v. California*, *supra*, 538 U.S. at pp. 31 (conc. opn. of Scalia, J.), 32 (conc. opn. of Thomas, J.).) Accordingly, a majority of the Supreme Court not only upheld Ewing's sentence, but would have upheld a three-strikes sentence in all but an "'exceedingly rare'" case. (*Id*. at p. 21; see also *Lockyer v. Andrade* (2003) 538 U.S. 63, 73-76 [123 S.Ct. 1166, 155 L.Ed.2d 144].)

This is not such a case. Defendant has a lengthy history of serious and violent crime. He started young; as a result, he has spent virtually his entire adult life either in prison or on the run. *Ewing* teaches us that the Eighth Amendment does not prohibit California from choosing to "incapacitat[e]" such a recidivist offender. (See *People v. Poslof* (2005) 126 Cal.App.4th 92, 109 [Fourth Dist., Div. Two] [where defendant had

"lengthy criminal record," three-strikes sentence for failure to register did not violate federal constitution].)

C. *Analysis Under the State Constitution.*

Under the state constitutional standard, "we must examine the circumstances of the crime, as well as the defendant's personal characteristics. [Citation.] If, given these factors, 'the penalty imposed is "grossly disproportionate to the defendant's individual culpability[]" [citation], so that the punishment """shocks the conscience and offends fundamental notions of human dignity""" [citation], [we] must invalidate the sentence as unconstitutional.' [Citation.]" (*People v. Boyer* (2006) 38 Cal.4th 412, 488.)

As long as a punishment is proportionate to the defendant's individual culpability ("intracase proportionality"), there is no requirement that it be proportionate to the punishment in other similar cases ("intercase proportionality"). (*People v. Horning* (2004) 34 Cal.4th 871, 913.) Accordingly, the cruel-and-unusual determination may be based solely on the offense and the offender. (*People v. Ayon* (1996) 46 Cal.App.4th 385, 399 (disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10) and cases cited.)

Here, the outstanding characteristic of both the offense and the offender was recidivism. Defendant has manifested a persistent inability to conform his conduct to the requirements of the law. Based on such recidivism, a three-strikes sentence — even for a nonviolent offense — "is not constitutionally proscribed." (*People v. Stone* (1999) 75 Cal.App.4th 707, 715; see also *People v. Poslof*, *supra*, 126 Cal.App.4th at p. 109.)

D. *Third District Cases Dealing with Failure to Register*.

We recognize that in *People v. Carmony* (2005) 127 Cal.App.4th 1066, the Third District held that, under the circumstances of that case, a three-strikes sentence for failure to register as a sex offender was cruel and unusual under both the federal and state Constitutions. (*Id*. at pp. 1075-1089.)

There, the defendant had registered properly; one month later, however, he had failed to reregister within five days of his birthday, as required. (*People v. Carmony*, *supra*, 127 Cal.App.4th at p. 1071.) The court reasoned, in part, that he had committed only a "technical and harmless violation of the registration law" and "did not evade or intend to evade law enforcement officers . . . ." (*Id*. at p. 1078; see also *id*. at p. 1086 [discussion under federal constitution is "equally applicable" under state constitution].) It specifically distinguished *People v. Meeks* (2004) 123 Cal.App.4th 695 [Third Dist.], which had upheld a three-strikes sentence for failure to register, on the ground that "Meeks failed to register after changing his residence and therefore, unlike in the present case, law enforcement authorities did not have Meeks's correct address and information." (*Carmony*, at p. 1082, fn. 11.)

Recently, the same court harmonized *Carmony* and *Meeks* in *People v. Nichols* (2009) 176 Cal.App.4th 428 [Third Dist.]. There, it upheld a three-strikes sentence for failure to register. The court distinguished a conviction for failure to register after a change of address, as in *Meeks*, from a conviction for failure to reregister annually, as in *Carmony*. (*Nichols*, at pp. 436-437.) The defendant before it had failed to register after leaving his residence and becoming a transient. (*Id*. at pp. 433-434.) The court

concluded that his "failure to register thwarted the fundamental purpose of the registration law, thereby leaving the public at risk." (*Id*. at p. 437.) "Defendant's failure to register when he left . . . and his thwarting the purpose of the registration act . . . , coupled with the seriousness of his prior convictions and his sustained criminality, all demonstrate his sentence was not grossly disproportionate to his offense." (*Ibid*.)

Here, like the defendants in *Meeks* and *Nichols* — and unlike the defendant in *Carmony* — defendant failed to register after a change of address. Indeed, he did so not just once, but twice. Moreover, he admitted to the probation officer that his failure to register was intentional, to prevent his reapprehension after he had absconded from his federal parole. Under these circumstances, *Carmony* is not controlling.

We therefore conclude that defendant's sentence is not cruel and unusual punishment under either the federal or the state Constitution.

V

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

I concur:

KING
J.

MCKINSTER, J., Concurring and Dissenting.

I respectfully dissent from the majority's analysis of the trial court's failure to investigate the bias of a prospective juror. (Maj. opn., *ante*, at pp. 4-11.) I otherwise concur.

The majority's analysis incorrectly focuses on *possible* bias of prospective jurors. Thus, the majority relies on *People v. Holt* (1997) 15 Cal.4th 619, 661, in which the defendant claimed the trial court had not adequately questioned prospective jurors about possible racial bias. (Maj. opn., *ante*, at p. 8.) This case involves actual bias expressed by a prospective juror, namely a belief defendant is guilty of the crime charged even before the prospective juror heard a shred of evidence. The fact that the prospective juror expressed actual bias against defendant is what distinguishes this case from the cases relied on by the majority and thus renders its analysis and conclusion incorrect.

Contrary to the majority's view, defense counsel raised the pertinent issue in the trial court and thereby preserved the issue for review on appeal by asking the trial court to attempt to identify the biased prospective juror. The majority, citing *People v. Holt*, would require that defense counsel ask prospective jurors a series of questions purportedly designed either to identify the biased prospective juror or to at least ensure that the actual jury does not include the biased prospective juror. (See Maj. opn., *ante*, at p. 8.) Although such questioning is sufficient to address a claim of potential bias, the majority overlooks the very real likelihood that prospective jurors would not answer the

questions truthfully. Therefore, the questions would not necessarily identify the biased prospective juror or ensure that the actual jury does not include that person.

The majority also holds that defendant cannot demonstrate prejudice in this case. In making that claim, the majority relies on *People v. Loker* (2008) 44 Cal.4th 691, a juror misconduct case. Again the majority's analysis is incorrect because juror misconduct is not necessarily prejudicial. Juror bias is prejudicial and in fact, and as the majority notes, the likelihood of juror bias is the standard that determines whether juror misconduct is prejudicial. (*Id*. at p. 747; see maj. opn., *ante*, at p. 10.)

I would hold that the trial court should have attempted to identify the biased prospective juror. I would analyze the effect of the trial court's error under the standard that applies to a claim of juror bias during trial. In that situation, if it appears substantially likely that a juror is actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict. (*People v. Marshall* (1990) 50 Cal.3d 907, 951.) A biased adjudicator is one of the few "structural defects in the constitution of the trial mechanism, which defy [*sic*] analysis by 'harmless-error' standards." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309; see also *Rose v. Clark* (1986) 478 U.S. 570, 577-578; *Morgan v. Illinois* (1992) 504 U.S. 719, 729; *People v. Cahill* (1993) 5 Cal.4th 478, 501-502.)

Because the trial court in this case did not investigate the claim of bias, we do not know whether the biased prospective juror was removed from the jury venire, the majority's speculation to contrary notwithstanding. As a result, that person might actually

have served on defendant's jury. The fact that defendant's jury might have included a biased juror requires us to reverse the judgment in this case. Accordingly, I would hold that the trial court court's error in this case requires reversal of the judgment. Because I would reverse the judgment on that ground I would not address defendant's other claims of error.

/s/ McKinster
Acting P.J.